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NO. 73-85

SUPREME COURT, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

BALDWIN COUNTY ELECTRIC MEMBERSHIP CORPORATION, *et al.*, and CITY OF LUVERNE, *et al.*,

Petitioners,

v.

PRICE COMMISSION, *et al.*, COST OF LIVING COUNCIL, CHAIRMAN OF THE COST OF LIVING COUNCIL, and ALABAMA POWER COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

BRIEF FOR ALABAMA POWER COMPANY IN OPPOSITION

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QUESTIONS PRESENTED

(A restatement of the issue presented by petitioner.)

Whether the Price Commission could properly conclude that Section 300.16(i)(3) of its regulations, which required regulatory agencies to suspend proposed rate

increases for the maximum period permitted by law, did not reverse a regulatory decision which had already been taken, where the proposed rate increase had not yet become effective.

(A further issue posed.)

Whether when the Price Commission had delegated authority to its staff to make initial decisions and announce the results in decision lists, but had provided in its regulations that requests for reconsideration could be filed to obtain hearing and written opinion of the Commission, and had further provided that such requests were necessary to exhaust administrative remedies and to obtain judicial review, Petitioners may have recourse to the courts directly from an initial decision and will be heard to complain of its summary character.

REGULATIONS INVOLVED

The Price Commission regulation governing public utilities when the Federal Power Commission issued its order of December 30, 1971, suspending the Alabama Power Company's proposed increase for two months was Section 300.16(a) (36 F.R. 23977):

§300.16 Regulated public utilities.

(a) *In general.* A person which is a regulated public utility (as defined in section 7701(a)(33) of the Internal Revenue Code of 1954 (26 U.S.C. sec. 7701(a)(33)), may charge a price, rate, or tariff in excess of the base price if that increase has been approved by a regulatory agency or other appropriate legal authority. A public utility which had revenues of $100 million or more during its most recent fiscal year shall inform the Price Commission of all requests for rate increases and immediately

notify the Commission in writing of any agency order granting an increase and of any other authorized increase. A public utility which had revenues between $50 and $100 million during its most recent fiscal year shall immediately notify the Commission in writing of any agency order granting an increase and of any other authorized increase. In order to insure that the goals of the economic stabilization program are attained, the Price Commission reserves the right to review and limit the amount of any such requested increase, ordered increase, or other authorized increase.[1]

The superseding regulation, Section 300.16(i)(3) (37 F.R. 653), which became effective after the order of December 30, 1971, but before Alabama Power Company's proposed rate increase had become effective, is reprinted in Petitioners' brief.[2]

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[1] Alabama Power Company fully complied with the informational requirements of this section by its letters of December 1, 1971, informing the Price Commission of its rate filing, and January 11, 1972, informing the Price Commission of the Federal Power Commission's order of December 30, 1971.

[2] Section 300.16(i)(3) was issued on January 14, 1972, and received by Alabama Power Company several days later. The Company immediately, by letter of January 18, 1972, volunteered certain information specified by the section. Upon further analysis the Company concluded that this action was unnecessary and advised the Price Commission by letter of February 1, 1972:

"Since the Price Commission's new rules were not effective until ... subsequent to the Federal Power Commission's order of December 30, 1971, it is our understanding that the old Price Commission rules are applicable to that Federal Power Commission order and the application of new rates commencing February 2, 1972."

The Price Commission regulations which required a request for reconsideration as a prerequisite to judicial review were contained in Section 305.70 *et seq.* (37 F.R. 1245):

Subpart G—Review of Initial Commission Decisions on Matters Other Than Exceptions

§305.70 Purpose and scope.

(a) Requests for obtaining initial decisions by the Commission other than for exceptions are initiated pursuant to Part 300 of this title.

(b) This subpart establishes the rules of the Commission governing reconsideration of denials of such requests, in whole or in part.

§305.71 Scope of review.

The Commission shall reconsider its initial action if the request for reconsideration makes a prima facie showing that the Commission's initial action was erroneous in fact or in law.

(a) Where the Commission determines that the request for reconsideration failed to make a prima facie showing, the Commission may summarily reject the request for reconsideration notifying the applicant of its action and advising him that he has exhausted his administrative remedies and that he may seek judicial review under the Act.

(b) Where the Commission determines that the appellant has made a prima facie showing, it will proceed in accordance with the provisions of §§305.37 through 305.38

§305.72 Who may request reconsideration.

Any person who meets the requirements set forth in §305.71 may request reconsideration by the Commission.

§305.73 Where to file.

A request for reconsideration shall be filed with the Price Commission, 2000 M Street, N.W., Washington, D.C. 20503.

§305.74 When to file.

A request for reconsideration must be filed within 10 days of service of the initial decision by the Commission.

§305.75 Contents of request.

A request for reconsideration shall–

(a) Be in writing and signed by the appellant;

(b) Be designated clearly as a request for reconsideration;

(c) Contain a concise statement of the grounds for reconsideration and the requested relief; and

(d) Be accompanied by briefs, if any.

Section 305.71(b) provided that if the Price Commission concludes that "the appellant has made a *prima facie* showing" of error in a request for reconsideration, the matter would proceed to hearing under Section 305.37 and then to formal decision by the Price Commission under Section 305.38. These sections read as follows (37 F.R. 1010):

§305.37 Hearing.

(a) If the Commission in its discretion deems that a hearing is advisable, it will, within 10 days of the request for reconsideration, direct that a hearing be held before a Hearing Officer, or where the Commission deemed it appropriate, before the Commission in the first instance.

(b) Where a hearing has been directed in accordance with paragraph (a) of this section, it will

be conducted within 10 days after written notice to the appellant at such time and place as the Commission may direct.

(c) Where hearing is conducted in accordance with this section, the appellant may present oral argument and submit such additional documentary evidence as the Hearing Officer deems necessary to fully disclose the position of the appellant.

(d) Within 10 days after the close of the hearing, the Hearing Officer will submit to the Commission a report and any recommendation he deems appropriate with respect to the appellant's request for reconsideration.

§305.38 Decision by Commission.

Where administratively feasible, within 10 days of receipt of a request for reconsideration, or within 10 days of a Hearing Officer's report, where a hearing has been directed–

(a) The Commission will issue a decision in writing directed to the appellant setting forth the facts, conclusions of law, its decision, the basis therefor, and an appropriate order.

(b) A copy of the decision and order will be served upon each party to the proceedings.

(c) Where the decision denies the relief requested, in whole or in part, each party will be advised that he may seek judicial review under the Act.

COUNTERARGUMENT

I.

The issue which Petitioners raised before the Price Commission was whether Section 300.16(i)(3) of its regulations, requiring maximum suspension of rate increases, was intended to reverse a regulatory agency

action that had already been taken, if the rate increase had not yet become effective. The Price Commission answered that the section was not so intended. On appeal the Temporary Emergency Court of Appeals affirmed, relying on three points of law:

1. "[A] governmental agency may not act contrary to its own regulations."[3] (Slip op. at 5.)
2. But when the regulation is silent on the point in issue and the intent is unclear, "an administrative agency's interpretation of its own regulation is entitled to great deference by the courts."[4] (Slip op. at 5.)
3. "As a further consideration, there is a strong presumption against construing regulations so that they have the effect of altering regulatory actions already taken."[5] (Slip op. at 6.)

Each of these points is firmly established in principle and unexceptionable in this particular application.

Not only does the Temporary Court's decision present no out-of-the-ordinary point of interpretation, but it relates to a subject that is now dead-letter. The regulation in question, Section 300.16(i)(3), is no longer in existence. The Price Commission has been terminated. While the Price Commission's functions have reverted to the

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[3] *Service v. Dulles*, 354 U.S. 363, 372 (1957); *Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

[4] *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *University of Southern California v. Cost of Living Council*, 472 F.2d 1065 (TECA 1972); *United States v. Lieb*, 462 F.2d 1161 (TECA 1972).

[5] Davis, ADMINISTRATIVE LAW TREATISE §5.08 (1958 ed.); *Greene v. United States*, 376 U.S. 149 (1964); *Atlantic Coast Line R. Co. v. Florida*, 295 U.S. 301 (1935); *Arizona Grocery Co. v. Atchinson, Topeka & Santa Fe R. Co.*, 284 U.S. 370 (1932).

Cost of Living Council, that agency has ended the control of public utility rates under the Economic Stabilization Program.[6]

To apply the standards for a writ of certiorari expressed in Rule 19(1) of this Court, the case does not present any "important question of federal law which has not been, but should be, settled by this court" and offers no "special and important reasons" for writ of certiorari.[7]

II.

Petitioners in their brief stress what they consider to have been their summary treatment before the Price Commission: their request for recission or suspension of the proposed rate increase was decided at the staff level and no formal written decision was issued. They fail to

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[6] Section 150.56 of the Cost of Living Council Phase IV Price Regulations provides (38 F.R. 21602):

"Rate increases for commodities or services provided by a public utility are exempt."

[7] Petitioners suggest at page 4 of their brief that the Federal Power Commission's order of December 30, 1971, was not a "final" order, since they had applied for rehearing. The law is directly to the contrary: an application for rehearing of a Federal Power Commission order does not impair its effectiveness or finality. Section 313(c) of the Federal Power Act, 16 U.S.C. §825*l*(c), specifically provides:

"The filing of an application for rehearing . . . shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order."

And Section 1.34(a) of the Federal Power Commission's Rules of Practice and Procedure, 18 CFR §1.34(a), states that an application for rehearing may be filed "after the issuance of any *final* decision or order by the Commission" (emphasis added).

say that the decision of which they complain was only an initial decision and that the Price Commission regulations spelled out procedures to obtain a formal decision of the Commission by requesting reconsideration. The regulations expressly provided, in fact, that such a request was *prerequisite* to judicial review.

The pertinent regulations were Section 305.70 *et. seq.*, entitled "Review of Initial Commission Decisions on Matters Other Than Exceptions."[8] The regulations contemplated that on a request for reconsideration, the Price Commission would make a preliminary determination of whether or not there was a *prima facie* showing that the initial decision contained error of fact or law. If such showing were made, the matter would be set for hearing culminating in a formal decision of the Price Commission.[9] If such showing were not made, the request for reconsideration would be rejected without hearing[10] but

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[8] These procedural regulations were published January 27, 1972, effective January 21, 1972 (37 F.R. 1245), and applied to the Price Commission's action of March 24, 1972, which is under review here. Later amendment of the procedural regulations made "multiple changes and additions of a perfecting and clarifying nature," but retained the essential requirements regarding exhaustion of remedies (37 F.R. 7623).

[9] Section 305.71(b) provided:

"Where the Commission determines that the appellant has made a *prima facie* showing, it will proceed in accordance with the provisions of §§305.37 through 305.38," providing for "Hearing" and "Decision by Commission."

[10] Section 305.71(a) provided:

"Where the Commission determines that the request for reconsideration failed to make a *prima facie* showing, the Commission may summarily reject the request for reconsideration notifying the applicant of its action and advising him that he has exhausted his administrative remedies and that he may seek judicial review under the Act."

also with formal decision.[11] Under either procedure, the aggrieved party was to be advised when the decision had been rendered that he had exhausted his administrative remedies and could "seek judicial review under the Act."[12] These regulations leave no doubt that the initial decision on Petitioners' request for recission or suspension of the proposed rate increase lacked the incidents of administrative finality essential to judicial review.[13]

Rejecting the prescribed procedures for obtaining a formal decision of the Price Commission, Petitioners took direct recourse from the initial decision to the district court. They now seek to plead the summary character of the initial decision against the Price Commission. But

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[11]Section 305.38 provided:

"Where administratively feasible, within 10 days of receipt of a request for reconsideration, or within 10 days of a Hearing Officer's report, where a hearing has been directed—

(a) The Commission will issue a decision in writing directed to the appellant setting forth the facts, conclusions of law, its decision, the basis therefor, and an appropriate order.

(b) A copy of the decision and order will be served upon each party to the proceedings.

(c) Where the decision denies the relief requested, in whole or in part, each party will be advised that he may seek judicial review under the Act."

[12]See Sections 305.38(c) and 305.71(a).

[13]This court in *Levers v. Anderson,* 326 U.S. 219, 222-223 (1945), recognized that "in a particular administrative pattern new opportunities to challenge afforded by the motion for rehearing may subject an order to such critical administrative review as to reduce it to the level of a 'mere preliminary or procedural' status, thereby divesting it of those qualities of administrative finality essential to invocation of judicial review." The Price Commission's regulations followed just such pattern.

this, of course, cannot be allowed. As the Temporary Court stated, "since the appellants, without complaining to the Commission, proceeded directly to federal court to challenge an action of the Commission, they will not now be heard to argue that, in fact, there was no 'action' taken by the Commission." (Slip op. at 8.) Petitioners' failure to exhaust their administrative remedies constitutes an independent basis for denial of a writ of certiorari.[14]

CONCLUSION

For the foregoing reasons the petition for writ of certiorari should be denied.

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[14]The Temporary Court has emphasized that the exhaustion doctrine applies with full force—indeed with special force—in the economic stabilization area. *City of New York v. New York Telephone Co.*, 468 F.2d 1401 (TECA 1972).